OH PHAIK LIN & ORS.

v.

CHOONG LYE HOCK ESTATE SDN. BHD. & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 315 OF 1983]
1 MARCH 1985

CIVIL PROCEDURE: *Appointment of two interim receivers and managers - Estate placed under Court administration - Transactions involving estate to be carried out with sanction of Court - Plaintiffs alleged defendants carried out transactions without such sanction - Whether there was partnership - Defendants contended plaintiffs had delayed in prosecuting their claim - Whether plaintiffs' claims barred by laches and acquiescences.*

This is an application for the appointment of two interim receivers and managers. This suit arises from the falling out of some members of a family. It also involves an incorporated company in which they have no interest. The events took place over a number of years and are set out in detail in the judgment. In brief, it involved an agreement between two people who were now dead and arrangements between their respective administrators, executors and trustees. In 1968, the High Court gave an order that one of the estates (the estate of "CBS") was to be placed under Court administration and that all of the transactions which involved the estate had to be carried out only with the sanction of the Court. The plaintiffs alleged that the defendants had carried out various transactions without the sanction of the Court. The defendants' defence was that the agreement was not a partnership. They also contended that the plaintiffs had delayed in prosecuting their claim and therefore the plaintiffs' claims were barred by laches and acquiescences.

Held:

[1] The fact that the lands as a fixed asset were omitted from the accounts did not decisively conclude the question of partnership. All the other documents had to be looked at as a whole, at the final hearing.

[2] In relation to the alleged delay, the Judge held that since the plaintiffs' claim to a partnership was just made in the pleadings, this was insufficient to debar the plaintiffs from obtaining the relief they sought.

[3] The issue of laches and acquiescences could only be decided at the final hearing because there would have to be an examination of the plaintiffs' state of mind as there can be no laches or acquiescences without specific knowledge of material facts.

[4] On the facts of the case, the estate of CBS could afford the appointment of receivers and managers.

[5] The Court should be slow to appoint an interim receiver or manager where the defendants would suffer or there is at least a possibility that they would suffer irreparable or serious injury should they succeed at the final hearing or where adequate protection can otherwise be afforded to the plaintiffs. On the evidence, there was no possibility of any injury to the defendants.

[6] That on the evidence the defendants have not offered adequate protection to the plaintiffs in lieu of the appointment of receivers of managers.

[7] The balance of convenience lies in protecting the assets of the alleged partnership pending the trial of the action or pending further order.

[8] In regard to all the factors and circumstances of the case, the Court exercised its discretion and made an Order in terms of this Application but omitting the word "partnership" since this issue was to be determined at the final hearing.

[Plaintiffs' application granted. Defendants to pay costs.]

Cases referred to:
Wood v. Hitchings 2 Beav 289
Federal Transport Service Co. Ltd. & Ors. v. Abdul Malik & Ors. [1973] 1 MLJ 216
Ong Heok & Anor. v. Ooi Bee Tat & Ors. [1982] 2 MLJ 326
Re Lister 6 TLR 160
Mollwo March v. Court of Wards 4 PC 419 [1871] 4 LR
Steward v. Blakeway 4 Ch App 603
Floydd v. Cheney [1970] Ch 602
Tucker v. Prior [1887] 31 SJ 784
Longbottom v. Woodhead [1887] 31 SJ 796
Tate v. Barry [1928] 28 SR (NSW) 380

Other source referred to:
Halsbury, 4th Edn., Vol. 16, Para. 1473 to 1474 & 1478

For the plaintiffs - Gan Teck Chee; *M/s Gan Teck Chee & Ho*
For the 1st defendant - Lim Ewe Hock (Lim Kean Chye with him); *M/s Lim Ewe Hock & M/s Lim Kean Chye & Co.*
For the 2nd defendant - Andrew Lim; M/s Lim Cheng Poh & Lim
For the 3rd defendant - K. Balasundram; M/s Balasundram & Co.

JUDGMENT

Edgar Joseph Jr J:

This Application for the appointment of two interim receivers and managers arises out of a suit involving members of a family who have fallen out. However, it also involves an incorporated company in which they have no interest.

In order to understand what their quarrel is about it is necessary to set out in some tedious detail, the sequence of events which caused matters to come to a head.

The case has a long and chequered history, the starting point being, 4 January 1943, when one Chuah Bah Say ("CBS") entered into an agreement in writing of that date ("the Agreement") with Choong Lye Hock Estate Limited later renamed Choong Lye Hock Estate Sendirian Berhad (the First Defendant - "D1" for short).

As the suit herein arises out of the agreement, it is necessary to set out its main provisions. They were these:

1. "CBS" was, without remuneration, to manage various lands described in the agreement and known collectively as Otaheite Estate (later called Ayer Itam Estate) and was to collect all the income, rents and profits accruing therefrom and account for the same to "D1" (Clause 3).

2. "CBS" was authorised to sell such part or parts of Otaheite Estate as he deemed fit but he had first to obtain the written consent of "D1" (Clause 4).

3. The proceeds of such sales were to be paid to "D1", as also the nett income, rents and profits aforesaid (after deducting certain specified interest payments, expenses and costs).

4. The proceeds of such sales and the revenue derived from the lands were to be apportioned as to three-fourths thereof to "CBS" and one fourth to "D1". Similarly, all losses (if any) were to be shared between them in like manner (Clause 6).

5. All references to "CBS" were to mean and include his personal representatives and, similarly, references to "D1" were to include their assignees (Clause 7).

The agreement was duly implemented but, in the events which transpired, "CBS" died intestate on 9 November 1949 and left surviving him his widow Oh Kee Lee ("OKL") and children who included three daughters namely, Chor Saw Oon (the Second Plaintiff - "P2" for short), Chor Phaik Gnor (the Second Defendant - "D2" for short) and Chor Phaik Har (the Third Defendant - "D3" for short).

But "CBS" also left his three-fourths share in the lands aforesaid which, it was alleged, are worth some RM90,000,00 (ninety million dollars). This, of course, means that "OKL" and each of her children, have a significant beneficial interest in the Estate of "CBS".

Letters of Administration to the Estate of "CBS" were granted on 19 March 1954 in favour of "D2" and one Chor Sin Keng ("CSK"), a son of "CBS", and together with "D1", they continued the implementation of the terms of the agreement.

Then, on 11 September 1965, "CSK" died thus leaving "D2", the sole surviving administrator of the Estate of "CBS".

Next, on 7 December 1959 "OKL" died testate and the present plaintiffs ("P1, P2, P3"? were appointed the executors and trustees of her estate.

Thereafter, from 10 November 1949 until 10 September 1965. "D1" solely, and subsequently with "D2", continued managing the lands. It was also alleged that in 1964 "D2" was appointed manageress by "D1".

More importantly, it was alleged that during the period from 10 November 1949 to mid 1968, about 15 subdivided pieces of the land were sold at prices below market value by "D1" without the prior sanction of the Court.

This led, it was said, to the Order of Court dated 12 July 1968 made in Penang High Court Civil Suit No. 64/68 whereby the Estate of "CBS" was placed under Court administration, the effect of which was that all transactions affecting the estate, other than for winding up and distribution, could only be carried out with the prior sanction of the Court.

It was further alleged, that despite this, in 1968, "D1" appointed one Guan Siang as general clerk and, in 1970, one Swee Hock as supervisor in the administration of the lands. Then, in 1975, it was alleged that "D1" and "D2" appointed "D3" as manageress of the lands without the sanction of the Court.

Complaint has also been made that "D1" and "D2" have been accepting numerous ground tenants (specified by name) occupying in all about 250 low-cost premises including about 100 extensions and out-houses on the lands at low premiums without prior sanction of the Court thus causing waste and *devastavit* to the Estate of "CBS".

Similar complaints have been made against "D3" who, acting with "D1", was alleged, since 1975, to have been accepting ground tenants (specified by name) on the lands and they occupy about 220 block-plan premises including extensions and out-houses without prior Court approval. It has also been alleged that she had been receiving secret profits for her own benefit in respect of transactions effected by her as manageress.

In so far as "D1" is concerned, it was alleged that between 1969 and 1980, it undertook to surrender substantial portions of the said lands (in which the Estate of "CBS" had a beneficial interest) to the Local Authority for use as excess roads and drains in various adjacent housing developments for inadequate consideration, without the sanction of the Court and without even the knowledge of the beneficiaries of the Estate of "CBS" except of course, "D2" and "D3".

This led, it was said, to an application to Court, made by the plaintiffs, which resulted in an *Ex parte* Order of Court dated 18 May 1984 whereby the defendants by themselves, their members, servants or agents were restrained, until further order from interfering in any way with the affairs of the said Estate. Whereupon, the defendants gave up possession of the lands and ceased collecting rents or receiving any income from the ground tenants.

In these circumstances, it was alleged that there is a vacuum in the administration of the lands. Accordingly, it was urged on the authority of *Wood v. Hitchings 2 Beav. 289, Federal Transport Service Co. Ltd. & Ors. v. Abdul Malik & Ors*. [1973] 1 MLJ 216, 219 and *Ong Heok & Anor v. Ooi Bee Tat & Ors.* [1982] 2 MLJ 326, 331 that to avoid further injury and loss it was necessary to appoint two interim receivers and managers to act as Officers of the Court to take possession of the lands and to receive the rentals arising therefrom. The names of two gentlemen, whose character and standing have been vouched for, have been proposed as interim receivers and managers, subject to the giving of security and the usual other conditions.

So much of the case for the plaintiffs.

On the other hand, the case for the defendants as gleaned from the defences filed and the submissions of their counsel, may be stated thus:

1. The agreement evidenced not a partnership but showed that two Co-owners had agreed to hold the lands and to sell them at their convenience the proceeds to be shared in proportions corresponding to their respective shareholdings.

It was strongly argued that there was no case at all for a partnership since the relevant accounts (produced by the defence), being Exhibit 4 annexed to Enclosure 50, studiously omitted any mention of the lands as a fixed asset. The case of *Re Lister* 6 TLR 160 was cited in support. It was pointed out that both the signatories to the agreement who alone would have personal knowledge as to this issue had long since died and their successors in title and or their assignees were far too young at the material time to know; for this reason, the accounts, although originating from the defence, were a contemporary record, unchallenged since 1968 and thus vitally important.

In the result, it was said that although the sharing of profits was a strong indication of a partnership (see *Mollwo March v. Court of Wards* 4 PC 419 [1871] 4 LR) this was open to rebuttal (see *Steward v. Blakeway* 4 Chancery Appeals 603) and the Court should find, "on the spot", that the accounts were more than sufficient for this purpose. Accordingly, it was urged that "D1" as Co-owner of an undivided ¼ share in the lands was entitled to let anyone into it.

2. Then it was said that there was inordinate delay and inaction of the part of plaintiffs in prosecuting their claims, the writ herein having been issued as late as 2 June 1983.

Moreover, the plaintiffs had shared in the revenue which accrued from the alleged wrongful lettings and could hardly now complain of any wrong-doing on the part of defendants on this score.

Accordingly it was submitted that the plaintiffs' claim were barred by laches and acquiescences and so the Court should decline the relief prayed for in the application now before it.

3. A final point was urged by counsel for "D3" that the Estate of "CBS", whose income was limited to collecting ground rents, could ill afford the appointment of a receiver and manager as this would entail a recurring expenditure of RM2,000 (two thousand dollars) per month.

On the central issue of partnership or no partnership, it was submitted by Mr. Gan, for the plaintiffs, and I agree, that the single fact of the omission from the accounts (tendered by the defence) of the lands as a fixed asset, whilst most material, does not conclude the matter. This would have to be considered in context, that is to say, along with the other connected documents (if any) and the surrounding circumstances as a whole, to be fully explored at the final hearing when there will be ample opportunity for cross-examination.

On the question of alleged delay, I had occasion to ask counsel during the argument, as to when it was that the plaintiffs' claim to a partnership was first made and resisted. Mr. Lim Ewe Hock, who appeared with Mr. Lim Kean Chye for "D1", replied that the claim and denial to a partnership were first made in pleadings. If this is so, I fail to see any delay sufficient to debar the plaintiffs from obtaining the relief they now seek by this application provided, of course, I am satisfied that there are grounds for granting the same.

On the question of laches and acquiescences, it is relevant to ask: when did the plaintiffs first come to know of the defendants' alleged wrong-doing? There can, of course, be no question of acquiescences or laches without specific knowledge of material facts (see **Halsbury** 4th Edn. Vol. 16 para. 1473 to 1474, 1478). This is just one example of an issue which arises on this part of the case by reason of the plaintiffs' Reply. There may well be others.

Clearly, the question whether the plaintiffs' claims are barred by laches and acquiescences can only be determined at the final hearing and not just on affidavits.

On the final point as to whether the Estate of "CBS" can afford the appointment of receivers and managers, Mr. Gan pointed out that according to the accounts tendered by the defence (see encl. 50 p. 3) there was no less than RM437,670 (four hundred and thirty-seven thousand six hundred and seventy dollars) due to the Estate of "CBS". There was also revenue to the tune of RM8,000 (eight thousand dollars) per month to be derived from rentals paid by ground tenants. In these circumstances, I see no insuperable problem on grounds of expense alone.

I have set out the rival arguments of counsel, which incidentally occupied some four hours, to demonstrate one cogent fact and that is this: the issues in the suit, involving as they do, an allegation of partnership, charges of fraud, mis-management and contempt of Court are not free from difficulty and can only be resolved at the final hearing when there will be full discovery and opportunity for cross-examination. In other words they raise serious questions to be tried.

I now come to my conclusions.

In considering the application, I have kept in the forefront of my mind the judgment of Megarry J (as he then was) in *Floydd v. Cheney* [1970] Chancery 602.

In that case, the learned Judge rejected *Tucker v. Prior* [1887] 31 SJ 784 which held that an interim receiver will not be appointed where the existence of a partnership is in question. He next referred to the exception to this rule when the Court will make the appointment if

the "assets are in danger" (see *Longbottom v. Woodhead* [1887] 31 SJ 796) and then referred to and concurred with the following passage in the judgment of Long Innes J in *Tate v. Barry* [1928] 28 SR (NSW) 380 at p. 387:

> ... that there is no such rule of practice as is now suggested, and that the denial of an alleged partnership is merely one of the factors to be taken into consideration in each case, and does not, of itself, debar the Court from appointing a receiver until that issue is determined; but it may well be that where the partnership is denied, the Court, having regard to the serious consequences entailed by the appointment of a receiver, will be reluctant to appoint a receiver in a case where such appointment would inflict irreparable injury upon a defendant who might succeed at the hearing, or where adequate protection can be otherwise afforded to the plaintiff.

Applying the above guidance given by Megarry J and, proceeding by the appropriate stages, I have put to myself and answered the following questions:

1.Q: What is the general approach to Application such as this where a partnership is alleged on one side and denied on the other?

A: Two principles must be kept in mind and these are:

(a) A denial of partnership is merely one of the factors to be taken into consideration but by no means a decisive one.

(b) However, the Court should be slow to appoint an interim receiver or manager where the defendants would suffer or there is at least a possibility that they would suffer irreparable or serious injury should they succeed at the final hearing or where adequate protection can otherwise be afforded to the plaintiff.

2.Q: Would the defendants in this case suffer or is there at least a possibility that they would suffer irreparable or serious injury should the appointment of a receiver be made and they succeed at the final hearing in demonstrating that there was after all no partnership?

A: There is no evidence of this.

I might add that it was alleged by Counsel for the plaintiffs, and not challenged by Counsel for the defendants, that the defendants would suffer no prejudice should an order be made in terms of this application.

3.Q: Has any or any adequate protection been offered by the defendants to the plaintiffs in lieu of the appointment of receivers or managers?

A: There is no evidence of this.

4.Q: Where does the balance of convenience lie?

A: It lies in protecting the assets of the alleged partnership pending the trial of the action or pending further order.

In the result, regard being had to the above factors and the circumstances of the case as a whole, I exercised my discretion by making an order in terms of this application but, omitting of course, the word "partnership" therein since that is a question which can only be determined at the final hearing.

The defendants will have to pay to the plaintiffs the costs of this application and I am now prepared to hear arguments as to any consequential orders that may be necessary.

Also found at [1985] 1 CLJ 280